

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ABC WOODLANDS, L.L.C.,                    )  
  )  
  Plaintiff,                    )  
  )  
  v.                                    ) C.A. No. 3576-VCP  
  )  
JAMES RICHARD SCHREPPLER,            )  
  )  
  Defendant.                    )

**MEMORANDUM OPINION**

Submitted: July 24, 2012  
Decided: August 15, 2012

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Defendant.*

**PARSONS, Vice Chancellor.**

This is an action for an order of ejectment of Defendant, James Richard Schreppler, from a disputed portion of real property located in Dagsboro Hundred, Sussex County, Delaware (the “Disputed Land”). The Disputed Land is a parcel of approximately 0.75 acres located at the eastern corner of the northernmost boundary line of land owned by Plaintiff, ABC Woodlands, L.L.C. (“ABC”). Two expert surveyors reached different conclusions as to whether or not the Disputed Land is located within the boundaries of lands to which ABC has established legal title.

This post-trial Memorandum Opinion constitutes my findings of fact and conclusions of law. For the reasons stated herein, I find that ABC has not met its burden of proof necessary to establish legal title to the Disputed Land, and thus is not entitled to an order of ejectment.

## **I. BACKGROUND**

There are only two parties remaining in this action. Plaintiff, ABC, is a Delaware limited liability company. Defendant, Schreppler, is a Delaware resident and a practicing chiropractor.

### **A. Facts<sup>1</sup>**

ABC owns real property in Sussex County, Delaware. In 1985, Schreppler began using a portion of land comprising approximately 36 acres toward the north and east of ABC’s property for hunting, fishing, and camping. Schreppler recorded a quitclaim deed

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<sup>1</sup> Many of the facts pertinent to this dispute are undisputed. Accordingly, only findings as to disputed facts recited in this Memorandum Opinion are accompanied by citations to the evidentiary record.

to the land in 1990 and a confirmatory deed in 2007. The confirmatory deed sets forth a metes and bounds description of the land based on a boundary survey plan that Schreppler commissioned in 2005 from Adams-Kemp Associates, Inc., Professional Land Surveyors and Planners (the “Kemp Survey”). The Kemp Survey used as its basis the metes and bounds description from an 1860 deed (the “1860 Deed”), conveying land adjacent to the land Schreppler now claims to ABC’s predecessor in title, Minos Truitt, recorded in the Office of the Recorder of Deeds, Deed Book 68, Page 12, and an 1860 survey based upon that description, recorded in Deed Book 503, Page 530 (the “1860 Survey”).

ABC also had the land surveyed. In 2008, Charles Eggleston of ABC commissioned Donald K. Miller of Miller-Lewis, Inc., Land Surveying, to perform a boundary survey (the “Miller Survey”) for the entire property that ABC claimed to own. The Miller Survey used as its basis a survey prepared for lands of Robert L. Harris (the “1844 Survey”), which is recorded in the Sussex County Orphans Court Docket T, Page 378. These lands were not in the chain of title of ABC’s lands, but rather were to the east/northeast.

The two surveyors reached different conclusions as to the location of the boundary line at the northwestern corner of one of the large tracts of ABC’s lands, which is the source of the present dispute. The Miller Survey shows the Disputed Land as being within ABC’s boundaries, while the Kemp Survey shows it outside of ABC’s boundaries.

## **B. Procedural History**

ABC filed its initial Complaint against Schreppler, William B. Wilgus, and Susan M. Wilgus on February 27, 2008, alleging interference with quiet enjoyment of ABC's property, slander of title, and tortious interference with contractual relations. ABC also asserted a count for declaratory relief and for a preliminary injunction. On March 25, 2008, Schreppler filed an answer to the Complaint and asserted counterclaims for adverse possession and slander of title. At the outset, the parties' disputes involved approximately 36 acres of land that ABC claimed to own.

On October 4, 2010, ABC moved for summary judgment on Schreppler's counterclaims. The Court, however, denied ABC's motion on February 22, 2011.

On May 30, 2012, the parties filed a Stipulation of Partial Dismissal, which the Court entered on the same day. Pursuant to the Stipulation, all claims by and against the Wilgus's were dismissed with prejudice, Schreppler agreed to dismiss his counterclaims against all of ABC's lands with prejudice, and ABC agreed to dismiss its claims against Schreppler with prejudice, with the exception of its claimed right to eject Schreppler from certain disputed lands. Additionally, the parties agreed that the only remaining issues for determination at trial were: (1) the boundary of ABC's lands through and to the north of Martin Mill Pond; and (2) whether a portion of the northern boundary of ABC's lands extended into Martin Mill Pond.

After additional discussions, Schreppler withdrew his claim to the pond area. Thus, the Court need not determine any issues regarding claims involving quiet title or

adverse possession, and only must determine whether or not ABC has legal title to the Disputed Land.

### **C. Parties' Contentions**

ABC asserts that it has legal title to the Disputed Land and therefore is entitled to an order of ejectment against Schreppler. According to ABC, the Miller Survey is the controlling survey, because it is based upon the 1844 Survey,<sup>2</sup> which is the more senior survey, and, unlike the Kemp Survey, does not result in any gaps of unowned land. Additionally, only the Miller Survey calls for ABC's land to be adjoined with the land of Edgar Timmons. In that respect, ABC contends that the Miller Survey comports with the description of ABC's lands found in a 1959 deed within its chain of title (the "1959 Deed").

Schreppler disputes the notion that the Miller Survey controls, relying instead on the Kemp Survey to show that the Disputed Land is outside the boundaries of lands to which ABC has established legal title. In support of this argument, Schreppler claims that, unlike the Kemp Survey, the Miller Survey is inconsistent with the legal description

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<sup>2</sup> For purposes of this Memorandum Opinion, I assume that the Miller Survey accurately depicted the lines of the 1844 Survey in mapping out the boundaries of the Disputed Land. Schreppler disputes that proposition, however, arguing that the Kemp Survey harmonized the 1844 Survey and the 1860 Deed, with both of them showing the Disputed Land outside of the lands to which ABC has established legal title. It is questionable whether ABC, which has the burden to prove legal title to the Disputed Land by a preponderance of the evidence, has presented sufficient evidence to prove that the Miller Survey, in fact, accurately conforms to the 1844 Survey. Having determined that ABC has not met its burden of proof for other reasons, however, I need not resolve this additional issue.

found in the 1860 Deed, which is the earliest known deed within ABC's chain of title. Therefore, according to Schreppler, it would be improper to rely upon the Miller Survey.

## **II. ANALYSIS**

### **A. Standard**

To obtain an order of ejectment, a plaintiff must: (1) not be in possession of the property; and (2) prove its legal title to the property.<sup>3</sup> It is sufficient for a plaintiff to prove legal title by a preponderance of the evidence.<sup>4</sup> The parties agree that ABC is not in possession of the Disputed Land. Thus, ABC need only prove its legal title to prevail on its claim for ejectment.

### **B. The Property Settlement Line Agreement**

In addition to its argument based on the Miller Survey, ABC advances a second argument in support of its claim for ejectment of Schreppler. ABC contends that it is entitled to eject Schreppler from the Disputed Land based on a Property Settlement Line Agreement (the "Agreement") among the title owners of all the surrounding property that accepts the boundaries set forth in the Miller Survey and has been formally recorded. Although ABC acknowledges that Schreppler was not a signatory to the Agreement, it nevertheless asserts that the Agreement gives it record title to the Disputed Land, and thereby precludes Schreppler from claiming it under the terms of the Stipulation of Partial Dismissal.

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<sup>3</sup> *Fede v. Deluca*, 1984 WL 19486, at \*3 (Del. Ch. Nov. 5, 1984) (citing *Doe v. Roe*, 80 A. 352, 354 (Del. Super. 1911)).

<sup>4</sup> *Doe*, 80 A. at 354.

Schreppler objects on procedural grounds to ABC's claim for ejectment based on the Agreement. Therefore, I address that argument first. Specifically, Schreppler asserts that ABC should be precluded from pursuing its argument regarding the Agreement, because ABC did not raise it until the day before trial and Schreppler would be prejudiced if the Court nonetheless considered it. I agree and sustain Schreppler's objection. Although this case is more than four years old, ABC provided basically no notice of its reliance on the Agreement until the eve of trial. ABC's opening pretrial brief merely alluded to the Agreement's existence in its recitation of the background facts. ABC fully articulated its claim to legal title based on the Agreement only in its pretrial reply letter, which was filed less than twenty-four hours before the start of the trial. When an argument is first raised in a pretrial brief after the parties already have shaped their trial plans, it is simply too late and deemed waived.<sup>5</sup>

Furthermore, the parties stipulated in the Pretrial Order that ABC's legal title to the Disputed Land derives from the 1860 Deed; no mention is made of the Agreement. The stipulations in a pretrial order are binding generally,<sup>6</sup> and will be modified by the

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<sup>5</sup> *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at \*15 n.56 (Del. Ch. May 23, 2008) (citing *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at \*22 n.117 (Del. Ch. Aug. 18, 2006)).

<sup>6</sup> *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at \*10 n.135 (Del. Ch. Dec. 21, 2011); *see also* 22 A.L.R.2d. 599 (1952).

Court only when necessary to prevent manifest injustice.<sup>7</sup> Therefore, ABC has waived its argument based on the Agreement by failing to raise it in a timely manner, and I will not consider it further.

### C. The Conflicting Surveys

The controversy in this case revolves around the conflicting conclusions reached by two expert surveyors, Miller, commissioned by ABC, and Kemp, commissioned by Schreppler, as to the boundary lines at the northwest corner of a large tract of land owned by ABC. The two experts, and their respective surveys, fundamentally disagree about which of two nineteenth-century surveys controls as more accurate and reliable.

Under Delaware law, “a survey may be considered as evidence of a boundary only if it is consistent with the property description in the authoritative source deed.”<sup>8</sup> Because the 1860 Deed is the earliest known source deed to ABC’s lands, it would seem that a survey depicting the boundaries called for in the 1860 Deed’s metes and bounds description should control over a conflicting survey that is not based upon the 1860 Deed.

Having considered the parties’ arguments and the record evidence, I conclude that ABC has failed to prove by a preponderance of the evidence, based on the Miller Survey or otherwise, that it has legal title to the Disputed Land. Thus, ABC is not entitled to an order of ejectment. ABC acknowledges that the 1860 Deed is the earliest known deed

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<sup>7</sup> See Pre-Trial Order, Docket Item No. 67, at 8 (July 18, 2012) (“This order shall supplement the pleadings and govern the course of trial unless modified by the Court to prevent manifest injustice.”).

<sup>8</sup> *Scureman v. Judge*, 626 A.2d 5, 16 (Del. Ch. 1992), *aff’d*, 628 A.2d 85 (Del. 1993) (TABLE).

within its chain of title and that the 1860 Survey is based upon the metes and bounds description called for in the 1860 Deed. ABC also agrees that only the Kemp Survey is based upon the metes and bounds descriptions of both the 1860 Deed and the 1860 Survey, while the Miller Survey is based upon the 1844 Survey of lands outside of ABC's chain of title. Nevertheless, ABC contends that a source deed is not controlling when it is clearly erroneous and that the 1860 Deed and 1860 Survey contain blatant errors. Consequently, ABC asserts that the boundaries shown in the 1844 Survey should control because: it (1) is the more senior survey<sup>9</sup>; and (2) accurately depicts ABC's land adjoining Timmons's land, as called for in the 1959 Deed, and, unlike the Kemp Survey, does not result in any gaps. None of these arguments is persuasive.

First, ABC argues that the metes and bounds description of the 1860 Deed is erroneous because it does not call for ABC's land to adjoin with Timmons's land, as called for in the 1959 Deed within ABC's chain of title. Rather, there is a gap of approximately 0.75 acres, which is the Disputed Land. Paragraph 19 of the 1959 Deed, however, states that the land is "adjoining lands *now or formerly* of the heirs of J. William Messick, deceased, William Brothers, A.K. Rickards, Irving Smith, Edgar Timmons, et al."<sup>10</sup> ABC has not offered any evidence to establish the boundaries of Timmons's land, or show that the boundaries of Timmons's land in 1959 were the same as in 1860. It is possible, therefore, that while ABC's land might not adjoin Timmons's

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<sup>9</sup> See 11 *C.J.S. Boundaries* § 123 ("The general rule is that where lines of senior and junior surveys conflict the lines of the senior survey control . . .").

<sup>10</sup> Def.'s Ex. 12 at 537 (emphasis added).

land in 1959 according to the boundaries called for in the 1860 Deed, the ABC land did adjoin Timmons's land in 1860, in which case the 1860 Deed and the 1959 Deed could be consistent. In fact, Miller himself admitted to such a possibility on cross-examination.<sup>11</sup>

Furthermore, it is well established that a grantor can convey title only to land that he or she actually owns.<sup>12</sup> Here, ABC claims that there are several deeds within its chain of title that call for its land to adjoin with Timmons's land. Yet, ABC has not proven, or even claimed, that any of these deeds precede the 1860 Deed. Assuming, for argument's sake, that the land conveyed in the 1860 Deed did not adjoin Timmons's land, a subsequent deed would not be able to convey that additional land between the Timmons and ABC properties. Thus, even if a conflict does exist between the 1860 Deed and subsequent deeds, the 1860 Deed will control as a matter of law.<sup>13</sup>

Second, ABC alleges that drawing the boundary lines in accordance with the description of the 1860 Deed would result in ABC's lands extending west past the bordering County Road by 100 feet. According to ABC, none of the other deeds within its chain of title indicate that ABC's lands extend so far west. The fact that ABC's lands

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<sup>11</sup> Tr. at 63 (“Q. So Timmons could have been further to the west back in [1860]? A. I don't know. I don't see how, but I don't know the answer to that. Q. But you can't say that that isn't a possibility, correct? A. It's a possibility.”).

<sup>12</sup> *Scureman*, 626 A.2d at 16 (citing 26 *C.J.S. Deeds* § 277).

<sup>13</sup> *Scureman*, 626 A.2d at 16 (“If because of a material mistake in the description of the boundary of conveyed property a deed conveys more than a grantor owns, the error is without legal effect and may be judicially corrected . . . . In those circumstances the boundary descriptions in the earlier deeds will control as a matter of law.”).

may not extend past the County Road in other deeds within its chain of title, however, does not necessarily render the 1860 Deed erroneous. ABC has not offered any evidence that would prove the accuracy of one deed over another. Moreover, even if I were to assume that there is an error in the 1860 Deed that causes ABC's lands to extend beyond the County Road, this would not mean necessarily that one or more of the boundary lines of the Disputed Land, in fact, were wrong.<sup>14</sup>

Miller testified on cross-examination, and ABC does not dispute, that it is possible that the boundary description relevant to the Disputed Land found in the 1860 Deed is completely accurate and that another line called for in the Deed erroneously may have led to the extension of the boundary over the County Road.<sup>15</sup> Given this possibility, ABC has not explained why the Court should rely on the 1844 Survey, rather than on the 1860 Deed or Survey, in determining the boundaries of the Disputed Land.

In short, ABC has not proven that the 1860 Deed and 1860 Survey clearly are erroneous in the way they set forth the boundaries of the Disputed Land. It is true that the Kemp Survey creates a gap between ABC's lands and an otherwise adjoining property and that the Disputed Land occupies this gap. But even assuming that the Miller

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<sup>14</sup> Cf. 26 C.J.S. *Deeds* § 213 (explaining that courts will strike down parts of a deed where an irreconcilable conflict exists).

<sup>15</sup> Tr. at 41 (“Q. You testified today that you can point to where those errors are? Can you tell us which lines are wrong on the 1860 survey? A. No, I wouldn't be able to do that today. Q. So that the lines in dispute may be completely accurate on the 1860 survey, and it may be those jagged lines that we talked about in your direct testimony that lead over to the road that could be wrong, correct? A. That's a possibility, yes.”).

Survey avoids any such gaps, this is not a sufficient reason to disregard the property description provided in the 1860 Deed that is within ABC's chain of title in favor of the description of the 1844 Survey, which is outside of ABC's chain of title.<sup>16</sup>

### **III. CONCLUSION**

For the reasons stated in this Memorandum Opinion, I dismiss with prejudice ABC's claim for an order of ejectment of Schreppler from the Disputed Land.

**IT IS SO ORDERED.**

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<sup>16</sup> For purposes of this action, I need not decide whether a survey within the relevant chain of title that creates a gap still would control over a conflicting survey outside the chain of title that does not create a gap. As previously mentioned, Kemp disputes the way that Miller interpreted the 1844 Survey and claims to have harmonized the 1844 Survey and the 1860 Deed. In particular, according to Kemp, the 1844 Survey also creates a gap. Because ABC has not proven by a preponderance of the evidence that Miller's survey or his interpretation of the key documents is correct, ABC has not demonstrated any basis for disregarding the deference that normally would be given to the 1860 Deed and Survey in a dispute such as this.